HARIRAM JAYARAM & ORS

v.

SENTUL RAYA SDN BHD (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: S5-24-1213-2002]
5 AUGUST 2003

CIVIL PROCEDURE: *Stay of execution - Application for stay pending appeal - Principles applicable - Whether there were special circumstances*

This was an application by the defendant for a stay of an order that the defendant pay the plaintiffs liquidated and ascertained damages ('LAD') in accordance with the express terms and conditions – which the defendant had breached – of certain sale and purchase agreements of condominium units purchased by the plaintiffs from the defendant, until its appeal to the Court of Appeal was heard. The crucial question to be resolved was whether the defendant had made out a case of special circumstances to justify the granting of a stay of execution.

Held:

[1] The defendant's pending appeal could not, in itself, constitute special circumstances, and the mere filing of an appeal to the Court of Appeal could not provide a reason for allowing the stay. The plaintiffs had waited patiently to move into their condominium units, and to grant a stay would cause manifest injustice to the plaintiffs as there would be a further delay of at least two to three years while the appeal was being heard. Furthermore, the fact that the plaintiffs were cash purchasers who financed the present litigation and were defending the appeal to the Court of Appeal showed that the defendant's assertion of difficulty in recovering the LAD was nothing more than mere speculation. On the facts, there was no material to convince the court that a stay should be granted; on the contrary, if a stay were to be granted, it would be unjust as the plaintiffs would be deprived of the fruits of their litigation. (pp 281 b-d, h & 283 g & 284 a)

[Application dismissed.]

Case(s) referred to:

Alexander & Ors v. Cambridge Credit Corporation Ltd (Receivers appointed) & Anor [1985] 10 ACLR 42 ***(refd)***

Che Wan Development Sdn Bhd v. Co-Operative Central Bank Bhd [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366 HC ***(refd)***

Hariram Jayaram & Ors v. Sentul Raya Sdn Bhd [2002] 4 CLJ 796 HC ***(refd)***

Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 SC ***(refd)***

Mohamed Mustafa v. Kandasami (No 2) [1979] 2 MLJ 126 ***(refd)***

Sarwari Ainuddin v. Abdul Aziz Ainuddin [1999] 8 CLJ 534 HC ***(refd)***

See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***

Wilson v. Church (No 2) [1879] 12 Ch 454 ***(dist)***

For the plaintiffs - NV Sree Harry; M/s Sri Ram & Co
For the defendant - Michael KT Chow; M/s Logan Sabapathy & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of encl. 12, the defendant sought for a stay pending appeal. I heard the arguments of the learned counsel on both sides and I had forthwith dismissed encl. 12 with costs. I shall now give my reasons for so doing.

Factual Background

It would be ideal to state, briefly, the facts of the case.

By the sale and purchase agreements, the plaintiffs purchased condominium units from the defendant. These sale and purchase agreements were the standard types as found in Schedule "H" of the Housing Developers (Control and Licensing) Regulations 1989 which were in turn made pursuant to and under the Housing Developers (Control and Licensing) Act 1966. Now, by cl. 22(1) and cl. 24(1) of the sale and purchase agreements, the defendant agreed to hand over vacant possession of the condominium units to the plaintiffs and to complete the common facilities within thirty six (36) calendar months from the date of the sale and purchase agreements (hereinafter referred to as "the 36 months"). By way of cl. 22(2) of the sale and purchase agreements, the defendant agreed to pay the plaintiffs liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centum (20%) of the purchase price in the event the defendant fails to complete the common facilities within the 36 months. And by virtue of cl. 7 of the sale and

purchase agreements, time was said to be of the essence of the contract. In total disregard and in blatant breach of the sale and purchase agreements, the defendant failed to complete the common facilities and deliver vacant possession of the condominium units to the plaintiffs within the stipulated contract time and this state of affairs prevailed at the time the plaintiffs filed the originating summons in encl. one (1).

In due course, I heard encl. one (1) and I ordered, inter alia, that the defendant to pay the plaintiffs liquidated damages in accordance with the express terms and conditions of the sale and purchase agreements (hereinafter referred to as "the said order"). A written judgment was handed down and it has since been reported in three popular local law journals, namely:

(1) *Hariram Jayaram & Ors v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 796; and

(2) *Hariram a/l Jayaram & 14 Ors. v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 796.

I shall refer to the reported judgment as the "first judgment" in the course of this judgment.

Aggrieved by the said order, the defendant has filed an appeal to the Court of Appeal. The defendant too has since filed encl. 12 for a stay of the said order pending the appeal to the Court of Appeal.

Observations

It is germane to mention that the defendant has always been aware of its liability to pay the plaintiffs liquidated damages for its failure to complete the condominium units within the stipulated contract time. That awareness makes the defendant a responsible developer. It is evident that the defendant has already made a provision of RM51.0 million as liquidated damages to be paid to the plaintiffs as the purchasers as seen at para. 28 of encl. 11A – the affidavit of Michael Keith Panter-Brick that was affirmed on 15 October 2002. Now, para. 28 of encl. 11A was worded in this way:

> It is pertinent to note that the Developer (referring to the defendant) was at all material times aware of their liability to pay the Purchasers (referring to all the plaintiffs) liquidated damages for which the developer has already made a provision of RM51.0 million to pay (the) liquidated damages.

A photocopy of a newspaper article appearing in The Star newspaper on 6th September 2001 is produced and shown to me and marked as exhibit 'A'.

The reputable "Star" newspaper carried good news to the plaintiffs. The write-ups in that newspaper carried the following tales:

YTL holds an 81% stake in Taiping Con, which will have to reduce to 75% to comply with the public share holding requirement.

Writing back provisions led to profit in latest period. In its latest result announced last Thursday, Taiping Con turned from losses to a RM20 million pre-tax profit in May-June 2001. Note that the company has changed its financial year-end from April to June to be coterminous with YTL Corp. The profit came from the write-back of RM22 million provisions made for the Sentul Raya project.

Taiping Con had made provision for liquidated ascertained damages in relation to interest/penalty charges for late delivery of units since the project was suspended in 1997. In total, it provided RM29 million in 1999 and a further RM22 million in 2000.

The new management under the YTL group is making its impact felt by extracting revenue and costs saving at the same time!

Sentul Raya is to be revived soon? We believe the write-back serves as a preliminary indication that Taiping Con may be close to removing the stumbling block to restart the Sentul Raya project. Taiping Con had earlier proposed a new scheme to the original buyers of Sentul Raya, among which is a proposal to waive interest, on late delivery, in order to revive the stalled project.

These were comforting news to the plaintiffs. And Michael Keith Panter-Brick, the deponent of the affidavit in encl. 11A, who was the 9th plaintiff herein must have felt elated. So were the rest of the plaintiffs. Michael Keith Panter-Brick was only expressing the sentiments of the rest of the plaintiffs when he affirmed that affidavit in encl. 11A. Indeed in affirming the affidavit in encl. 11A, Michael Keith Panter-Brick was duly authorised to affirm that affidavit on behalf of the 1st to the 15th plaintiffs, save and except the eighth (8th) plaintiff. It must be recalled that in the first judgment, I had alluded to the fact that the eighth (8th) plaintiff had decided not to pursue with the originating summons in encl. one (1).

Be that as it may, Michael Keith Panter-Brick further deposed in encl. 11A that the justice and the balance of convenience weighed heavily in favour of the purchasers who were the plaintiffs herein. He deposed that (see para. 9 of encl. 11A):

> The purchasers herein (referring to all the plaintiffs) have waited for between three (3) to four (4) years to secure vacant possession of the condominium units purchased and the granting of the stay herein would cause further delay.

It was now entirely up to me to decide whether to allow the stay. However, I take note that notwithstanding the said order which declared, *inter alia*, that the plaintiffs herein (except the eighth (8th) plaintiff) were entitled to set-off the balance of the purchase price against the liquidated damages payable by the defendant, yet the defendant had the audacity to issue letters to the plaintiffs threatening to annul their respective sale and purchase agreement and to forfeit ten (10) percent to twenty (20) percent of the purchase price plus interest if the plaintiffs failed to settle their respective outstanding progress payment and interest within fourteen (14) days from 30 October 2002 (hereinafter referred to as the "defendant's demand"). In my judgment, the defendant's demand was a clear illustration of the defendant's wrongful, inequitable and unconscionable conduct. I am constrained to hold that it would not be a proper exercise of my discretion to allow the stay.

The Legal Semantics

The law may be stated in this manner.

The court has an absolute and unfettered discretion to grant or to refuse a stay (*Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701). As a rule, the court will only grant a stay if there are special circumstances which must be deposed to on an affidavit. The justice of the case on a stay application is arrived at by striking a judicious and equitable balance between the principle that the successful party in the litigation ought to be allowed to reap the fruits of the litigation and not obtain a mere barren success with the countervailing principle that should the unsuccessful party in litigation be ultimately successful in his appeal, he ought not to be deprived of the fruits of his litigation due to the result of his appeal being rendered nugatory. But it must always be borne in mind that a successful party in litigation has acquired a vested interest in the outcome of the case whereas the other party who loses or who appeals merely has an interest contingent upon a successful outcome of his appeal. I say that it is primarily for this reason coupled with the implied caveat that the courts should

discourage parties who lose their cases upon merits from wrenching the fruits of litigation from the successful parties – by merely keeping the litigation alive through spurious appeals without any real prospect of success, and simply in the hope of gaining respite against immediate execution upon the judgment that the courts have been and are only moved to grant such a stay upon a set of certain requirements which, for want of a more appropriate and apt term, the courts have been driven to use, quite rightly, the now popular expression "special circumstances". As against this, the courts would also consider the all important question of whether the unsuccessful parties appeal if successful would be rendered worthless because it cannot be put back to its former position.

With alacrity, I must say that the expression "special circumstances" is an expression to denote a combination of determining factors that must be demonstrated by way of an affidavit evidence in order to persuade the court that it is just and appropriate to grant a stay in the circumstances of the case. His Lordship Kirby P, when delivering the judgment of the Court of Appeal of New South Wales in the case of *Alexander & Ors v. Cambridge Credit Corporation Ltd (Receivers appointed) & Anor* [1985] 10 ACLR 42, proceeded to set out the following three essential ingredients in favour of a stay:

(i) where "the balance of convenience" is in favour of the applicant;

(ii) where "it is apparent that unless a stay is granted an appeal will be rendered nugatory"; and

(iii) where the applicant "has an arguable appeal".

Traditionally the courts here and in the Commonwealth jurisdictions have, in essence, adopted as its core ingredients the above mentioned three generic ingredients for granting a stay.

The "nugatory" ingredient is not an exclusive or a singular condition. It is an essential condition precedent which if not made out to the satisfaction of the court, a stay will not be granted, whatever the merits of the appeal and the balance of convenience. Similarly, if the other two ingredients, *viz*, "an arguable appeal" and the "balance of convenience" are not made out to the satisfaction of the court then a stay will not be granted. It seems to me that anyone of the three traditional core ingredients would not suffice to tilt the balance in favour of a stay. That this is so, has been confirmed by our own highest court – the then Federal Court in the case of *Mohamed*

Mustafa v. Kandasami (No. 2) [1979] 2 MLJ 126, FC, where Abdul Hamid J, (who later rose to be the Lord President), speaking for the then Federal Court aptly said at p. 127 of the report:

> One of the determining factors that calls for consideration is whether by not making an order to stay of the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal. How pertinent that factor would be may vary according to the circumstances of each particular case.

That this is the law receives its stamp of approval by another coram of the then Supreme Court in the case of *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701, SC.

Now, as the phrase that was used by Abdul Hamid J, (who later rose to be the Lord President), while speaking for the then Federal Court in the case of *Mohamed Mustafa v. Kandasami (No. 2) (supra)* was, "One of the determining factors", one would certainly be misreading the gist or tenor of that decision if one were to hold or imply that the "nugatory" factor was the sole or the novel ingredient considered by that court or that, a fresh approach had been advanced or postulated therein. That would be the first impression one gets when one reads that judgment. Be that as it may, in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299, CA, the Court of Appeal had, quite rightly, adopted the three traditional core ingredients as its guideline principles when the court there rejected the application for a stay. At pp. 312-313 of the report, the Court of Appeal aptly said:

> But cases may arise where, in determining the critical question whether an appeal would be rendered nugatory, this court comes to the conclusion that the point concerned in the pending appeal is obviously unarguable. In such cases it would not, as I perceive the law, be a proper exercise of discretion for this court to shut its eyes to the practical realities of the situation, and to nevertheless proceed to grant a stay.
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> Take this very case. It is clear from the authorities that the substantive appeal, based upon a single point of interpretation, lacks all merit and is doomed to failure. In this state of affairs, would it be a proper exercise of discretion to permit a stay and cause a delay in the prosecution of the petition? I think not. Apart from the absence of merits, there are other reasons as well.

So, it can be surmised that an "obviously unarguable appeal", that "the substantive appeal lacks merit" and is "doomed to failure" are features which would not convince the court to exercise its discretion to grant a stay. Surely the successful party is entitled to the "fruits of his victory" unless the applicant can show "special" or "exceptional" circumstances that would warrant the imposition of a stay.

Analysis Of The Available Evidence

The crucial question to pose would be: whether the defendant had made out a case of special circumstances to justify the granting of a stay of execution? It must be recalled that the plaintiffs herein were purchasers of condominium units. They signed the sale and purchase agreements between September 1995 and November 1996. The defendant, as the developer, was required to deliver vacant possession of the condominium units between September 1998 and November 1999. But the defendant failed to do so. Finally, after a full blown hearing the plaintiffs obtained the said order from this court allowing the plaintiffs to set off the outstanding purchase price to be paid to the defendant against the liquidated and ascertained damages ("LAD") that were awarded to the plaintiffs. The LAD awarded were more than the outstanding purchase price that remained payable by the plaintiffs to the defendant. Thus, the plaintiffs were not required to pay the outstanding purchase price but were entitled to vacant possession. The defendant completed the condominium units on or about 30 September 2002. Pursuant to the said order, the plaintiffs attempted to take delivery of their respective condominium units but the defendant placed an obstacle. The defendant had unfairly and unconscionably insisted that the plaintiffs pay the outstanding purchase price and even threatened to annul the sale and purchase agreements and forfeit 10% to 20% of the purchase price. The defendant filed the application for a stay as seen in encl. 12 essentially on the grounds that, firstly, the defendant has filed an appeal to the Court of Appeal and, secondly, that there is a pending application to the Ministry of Housing for an extension of time under reg. 11 of the Housing Developers (Control and Licensing) Regulations 1989 (hereinafter referred to as the "EOT application"). In this context, Michael Keith Panter-Brick in his affidavit in encl. 11A at para. 22 thereto deposed that:

> … there is no certainty that the Developer (referring to the defendant) will be successful in their application nor is there any certainty as to when will the Controller of Housing issue the Certificate allowing the extension of time.

and it was an averment which was very reasonable in the circumstances of the present case because as I said in the first judgment that:

Perhaps the defendant developer knew that any application to waive or modify such provisions made after the expiry of the time stipulated for the handing over of vacant possession shall not be approved by the controller of housing.

Now, I am told that the defendant has a change of heart. On 28 April 2003, the defendant informed this court that it is now abandoning the EOT application ground. What is now left would be the ground that there is a pending appeal to the Court of Appeal. That, in my judgment, cannot constitute special circumstances. An appeal does not, in itself, amount to special circumstances. The mere filing of an appeal to the Court of Appeal cannot provide a reason for allowing the stay.

The plaintiffs have patiently waited since 1998 to move into their condominium units – their dream homes. To grant a stay would cause manifest injustice to the plaintiffs because there will be a further delay of at least two (2) to three (3) years while waiting for the hearing of the appeal at the Court of Appeal. Mr. NV Sree Harry, the learned counsel for the plaintiffs, submitted that the appeal to the Court of Appeal was bound to fail. It was his argument that the plaintiffs should not be deprived of occupying the condominium units and he further submitted that any delay would have adverse effects on the physical conditions of the plaintiffs' homes. Ultimately, after the passage of many wasted months or even years, the appeal will finally fail in the Court of Appeal and, if the stay was granted, the plaintiffs would have been deprived of enjoying their homes. These were the submissions of Mr. NV Sree Harry.

Without a doubt, the effect of a stay would be to prolong the disposal of what in essence is a simple matter. When viewed in this perspective, it is not difficult to see where the justice of the case lies. But, Mr. Michael K.T. Chow, the learned counsel for the defendant, argued that its appeal to the Court of Appeal would be rendered nugatory in the sense that the *status quo* may by irreversible in the event its appeal is allowed. Mr. Michael K.T. Chow was concerned about the financial position of the plaintiffs and he relied heavily on the case of *Wilson v. Church (No 2)* [1879] 12 Ch 454. By way of a rebuttal, Mr. NV Sree Harry responded and he pointed out that the plaintiffs were cash purchasers who have financed the present litigation and are defending the appeal at the Court of Appeal. According to Mr. NV Sree Harry, all these would show that the defendant's assertion of the difficulty in recovering the LAD was nothing more than mere speculation.

I pause here for a moment. I must take stock of the situation.

I have this to say of the case of *Wilson v. Church (No. 2) (supra)*. That case can readily be distinguished. That case cannot be applied to the facts of our case. In that case, the Court of Appeal there was faced with a different situation. There if the stay pending appeal was not granted it would have been very difficult to recover the money because the money was to be distributed among 900 to 1000 persons who were not the actual parties to the suit and therefore it would be very difficult to reach them for the purpose of getting back the money in the event the appeal was allowed. At p. 458 of the report, Cotton LJ writing a separate judgment remarked:

> Acting on the same principle, I am of the opinion that we ought to take care that if the House of Lords should reverse our decision (and we must recognise that it may be reversed), the appeal ought not to be rendered nugatory. I am of opinion that we ought not to allow this fund to be parted with by the trustees, for this reason: it is to be distributed among a great number of persons, and it is obvious that there would be very great difficulty in getting back the money parted with if the House of Lords should be of opinion that it ought not to be divided amongst the bond-holders. They are not actual parties to the suit; they are very numerous, and they are persons whom it would be difficult to reach for the purpose of getting back the fund.

In sharp contrast would be the present case before me. There are only fourteen (14) active plaintiffs as opposed to the 900 to 1000 persons in *Wilson v. Church (No. 2)*. All these fourteen (14) active plaintiffs are parties to the suit and their particulars are well within the defendant's knowledge as opposed to the 900 to 1000 persons who were not parties to the action in the Wilson's case. At any rate, to take the extreme case, it can be said that the risk of a plaintiff dissipating the money is a universal risk regardless of whether the plaintiff was rich or poor and being a universal risk it cannot be considered special circumstances (*Sarwari a/p Ainuddin v. Abdul Aziz a/l Ainuddin* [1999] 8 CLJ 534).

Mr. Michael K.T. Chow submitted that if the stay was not granted, the respective units of condominiums would have been occupied by the plaintiffs. He then continued to submit that should there be a need for the plaintiffs or any one of them to reconvey the condominium units to the defendant for reason of inability to repay the defendant the sums set-offs, these condominium units will definitely not be returned to the defendant in its original state. I must categorically say that the plaintiffs as the successful parties must be entitled, in law, to the fruits of their victory. The plaintiffs

are entitled to occupy the condominium units and being cash purchasers their financial standing cannot be doubted. It must be recalled that the LAD awarded were more than the outstanding purchase price.

Mr. Michael K.T. Chow seemed to say that the plaintiffs would not be prejudiced if the stay was granted by this court because according to him all that the stay order would require would be that the plaintiffs to pay up the sums which they have each in the first place bargained for under their respective sale and purchase agreements with the defendant. That submission overlooked the fact that the defendant too had bargained to deliver vacant possession within the stipulated contract time but failed to do so. The defendant's application for a stay hinged on only one factor. A very weak factor. It was the defendant's stand that the stay ought to be given because there is a pending appeal to the Court of Appeal. But, according to NH Chan J (as he then was) in *Che Wan Development Sdn Bhd v. Cooperative Central Bank Bhd* [1989] 2 CLJ 584; ([1989] 1 CLJ (Rep) 366):

> Merits or strong grounds for an appeal are also not special circumstances.

Earlier on, at p. 589 (p. 370) of the report, his Lordship NH Chan J (as he then was) said that:

> It is plain that the validity or correctness of the decision appealed from are not special circumstances.

To me, the defendant's liability to pay out the LAD is a natural consequence of the defendant's failure to deliver vacant possession of the condominium units within the stipulated contract time. It is a known fact that the defendant has always been aware of its liability to pay the plaintiffs LAD for which the defendant had already made provisions in the sum of RM51 million to pay the LAD arising from the defendant's failure to deliver vacant possession of the condominium units within the stipulated contract time.

Conclusion

I refused to grant the stay for the reasons as adumbrated above. If the stay is granted, the result would be very debilitating. Pure and simple, it will be a denial of justice bearing in mind that the plaintiffs have suffered all these years. The stay would definitely perpetuate the suffering further.

Mr. NV Sree Harry rightly submitted that the purpose of the said order is to put the fruits of the plaintiffs' litigation into their mouth, so to speak. He too rightly posed this question:

Who is the defendant, whom this court has found liable, to say that the plaintiffs should not be allowed to chew the fruits of their success?

Indeed that would be a pertinent question to ask. There was no material before me to convince me that a stay should be granted. Being successful, the plaintiffs were certainly entitled to the fruits of their litigation. I must, therefore, dismiss encl. 12 with costs.